

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

TE'ERRA J.,

Claimant,

vs.

INLAND REGIONAL CENTER,

Service Agency.

OAH No. L 2007030904

DECISION

This matter came on regularly for hearing before Administrative Law Judge Roy W. Hewitt, Office of Administrative Hearings, at San Bernardino California on May 10, 2007.

Claimant, who was present at the outset of the hearing, was represented by her foster mother.

The Inland Regional Center (agency) was represented by Deborah Crudup.

Oral and documentary evidence was received and the matter was submitted on May 10, 2007.

ISSUES

1. Was the agency obligated to provide a level of service determination or Alternative Residential Model (ARM) rate concerning claimant to the Riverside County Department of Children & Family Services (DCS) when claimant was placed in the Rochelle Sherman Small Family Home (the facility) on May 31, 2005?

2. If the answer to issue number one is "yes," what was the appropriate ARM rate in 2005?

3. What is the current, appropriate ARM rate concerning provision of services to claimant?

FACTUAL FINDINGS

1. Claimant, whose date of birth is November 16, 1997, is a nine-year-old female who qualifies for agency services based on diagnoses of Mental Retardation, characterized as “SEVERE,” Cerebral Palsy, and Epilepsy. (Exhibit 7.)

2. Ms. Jane Gerritas cared for claimant for four years, from 2001 until May 31, 2005 when claimant was placed in the Rochelle Sherman Small Family Home (the facility). At the time Ms. Gerritas cared for claimant, Ms. Gerritas’ care facility was ARM rated as level 4D.¹

3. On May 31, 2005, DCS placed claimant in the facility due to Ms. Gerritas’ pending retirement. At the time of the placement, the agency was not immediately notified.

4. Ms. Gerritas testified that although she could adequately care for claimant at her ARM level 4D facility, claimant’s condition, especially in the area of feeding, was deteriorating or “digressing.”

5. In 2004, Natasha H. was being cared for in the facility, which was licensed as a “Specialized Residential Facility.” In a June 4, 2004, “Payment Agreement” the agency set the ARM rate for the facility at 4I. In pertinent part, the agency’s June 4, 2004 “rate letter” states:

“The service provider agrees to accept the following negotiated rate of payment for the service named above, provided to Natasha H. at the rate of: **\$4,156 (Level 4I for programming, not including SSI/SSA board and care rate).**

The service provider agrees to accept the above rate of payment in full to provide this service at a minimum of ARM level 4I service provision as defined in Title 17 and in IRC’s Admission Agreement. (Agency’s Exhibit 23, emphasis in original.)”

6. On June 4, 2004, when the rate letter referenced in Finding 5 was issued by the agency the facility had a “Vendor Capacity” of one, Natasha H. The agency was not consulted by DCS prior to claimant’s May 31, 2005 placement in the facility. Consequently, prior to claimant’s placement in the facility, the agency did not have the opportunity to address the issue of what placement designation (ARM rate) was appropriate for claimant. However, the agency

¹ Pursuant to California Code of Regulations, title 17, section 56005, the agency is required to rate service levels for facilities upon receipt of a written request from a residential service provider. As described in California Code of Regulations, title 17, section 56004, the service levels (ARM rates) range from level 2 through level 4I (level 4 is subdivided into subparts A through I, depending on the number of staff hours and consultant hours required by the consumer(s)).

was aware of claimant's placement within days after claimant was placed in the facility. This is evidenced by the agency's June 2, 2005 Quality Assurance annual visit report. In the June 2, 2006 Quality Assurance report, the agency's representative reported that the facility was a level "4I/Spec. Rate" with two non-ambulatory clients. (Claimant's Exh. 3.) The report indicated that the facility's "License Cap" was "2,"² while its vendor capacity was "1" and that there were no vacancies in the facility. (Claimant's Exh. 3.) The report acknowledged claimant's presence in the facility and revealed that the agency was informed, at least as of the date of the report, that claimant, "Terra moved in 5/31/05." (Claimant's Exh. 3.)

7. On an agency "PLACEMENT INFORMATION" form dated June 7, 2005, an agency Consumer Services Coordinator indicated:

"3. The facility is a level 4I operated home. . .

4. The monthly Board & Care is authorized from 5/31/05 and payment is made by RW. County DCS. . . (Claimant's Exhibit 4.)³"

8. Sometime between May 31, 2005 and July 7, 2005, based on Rochelle Sherman's desire to adopt claimant, DCS requested the agency to author an ARM rate letter for claimant's placement. By letter, dated July 7, 2005, the agency responded, in pertinent part:

"This letter is in reference to your request for an Alternative Residential Model (ARM) rate for [claimant]. [Claimant] was placed, by DCS, into Rochelle Sherman's Small Family Home on May 31, 2005 without collaboration with Inland Regional Center. Ms. Sherman's home is vendored with Inland Regional Center with a capacity of one (1) "consumer specific" designation. Therefore, an ARM rate cannot be provided for [claimant]. (Agency's Exhibit 21.)"

9. Due to the lack of an ARM rate letter DCS has not been paying claimant an appropriate rate for the necessary services she has been receiving. Consequently, since

² The facility license confirms that the facility was, at the time, licensed to provide care for "TWO NON-AMBULATORY DEVELOPMENTALLY DISABLED CHILDREN AGES 3 THROUGH 17." (Agency's Exhibit 24.)

³ During the hearing, the agency argued that the Service Coordinator who authored the placement information form made a mistake based on his review of the "client specific" June 4, 2004 payment agreement for care rendered to Natasha H., as described in Finding 5. The Service Coordinator, however, did not testify during the instant hearing and only he knows why he issued the placement information indicating that the monthly Board & Care at a level 4I rate was "authorized from 5/31/05."

claimant's placement in the facility, her foster mother, Rochelle Sherman, has personally paid for, and continues to pay for, necessary services that DCS should have been funding.

10. Unfortunately, claimant's condition has continued deteriorating since her placement in the facility on May 31, 2005. Claimant, who is non-verbal and non-ambulatory, has a recent history of increased seizure activity. Claimant has spasticity and contractures in her arms and legs, for which she requires medication and physical therapy. Claimant is incapable of moving her extremities and must be repositioned (turned) every two hours, at a minimum. Claimant cannot swallow. She requires suctioning every 15 to 30 minutes and must be closely monitored during feeding. Claimant's inability to swallow gave rise to the need for a Nasogastric (NG) Tube (feeding tube). On April 13, 2007, a physician ordered the placement and use of an NG Tube for feeding.

On April 30, 2007, a physician ordered that claimant's feedings be supervised by either a Registered Nurse or a Licensed Vocational Nurse. Consequently, Loma Linda University Medical Center Home Care Services began monitoring claimant for the use and care of the feeding tube. A home health care nurse inserts the feeding tube, checks the placement of the feeding tube, and supervises claimant's feedings.

Claimant has bilateral rigid wrist braces, which are applied for six hours per day, with an hour break between applications.

An April 27, 2007 medical examination revealed that claimant's muscles are severely contracting. Consequently, the examining physician ordered that claimant be administered physical therapy by a Licensed Physical Therapist at the rate of two times per month.

On May 1, 2007, claimant was evaluated by a Licensed Physical Therapist. The therapist concluded that claimant needed daily, passive range of motion (ROM) exercises to prevent further joint contractures and skin breakdown. The therapist also recommended continued daily use of wrist, leg and spine braces.

Claimant's scoliosis is worsening over time. Her spine is beginning to curve to the left and she cries in pain when straightening of her spine is obtained by use of a brace.

11. Claimant's condition is severe and requires a 4I ARM rated placement.

LEGAL CONCLUSIONS

1. Using hindsight, it is not possible from the evidence provided to determine if claimant needed an ARM rate 4I facility to provide for her special needs in 2005. It is clear that in 2005, prior to her placement at the facility, claimant was receiving care from a 4D ARM rated facility (i.e., Gerritas' facility) and that her condition, at least with respect to feeding

needs, was, and continues to be worsening. Therefore, the evidence establishes that claimant needed to receive care from at least a 4D ARM rated facility in 2005.

2. California Code of Regulations, title 17, section 56005 describes the “Facility Service Level Approval Process.” The relevant provisions of section 56005 provide that a residential service provider, in this case DCS, “shall submit a written request to the regional center to establish an approved Service Level 2, 3, or 4.” Then, within 45 days of receipt of the request, the regional center must respond by either approving the requested service level, or disapproving the requested service level “specifying the reason(s) for disapproval.” As set forth in Finding 8, the agency responded to DCS’ request for establishment of an ARM rate within the required 45 day period, by stating: “[Claimant] was placed, by DCS, into Rochelle Sherman’s Small Family Home on May 31, 2005 without collaboration with Inland Regional Center. Ms. Sherman’s home is vendored with Inland Regional Center with a capacity of one (1) ‘consumer specific’ designation. Therefore, an ARM rate cannot be provided for [claimant].” (Agency’s Exhibit 21.) Consequently, the agency met the technical requirements of California Code of Regulations, title 17, section 56005, subdivision (b)(2). Unfortunately, in replying to DCS’ ARM rate request, the agency did not state its opinion as to what level ARM rated facility would be necessary to meet claimant’s needs. This failure was detrimental to claimant’s foster mother because, as set forth in Finding 9, Rochelle Sherman has had to, and continues to, pay for services DCS should have been funding for claimant.

3. As set forth in Findings 2 and 4, at the time claimant was placed in the facility, she required care from at least an ARM rated 4D facility. The factual findings, considered in their entirety, also establish that claimant now needs a 4I ARM rated facility and that the facility run by Rochelle Sherman is capable of providing 4I ARM rated services, as described in California Code of Regulations, title 17, section 56004. Consequently, the agency must issue a rate letter to DCS setting a 4I ARM rate to be used by DCS for establishing the appropriate Adoptive Assistance Program (AAP) rate for claimant.

4. This tribunal does not have jurisdiction to order DCS to make retroactive payments to Rochelle Sherman for past payments she has made for necessary services DCS should have been funding. However, fundamental fairness dictates that DCS should make retroactive payment to Rochelle Sherman using an AAP rate for the services actually funded by Rochelle Sherman. The evidence reveals that those services were provided at an ARM rate 4I level.

ORDER

WHEREFORE, THE FOLLOWING ORDER is hereby made:

The agency shall provide DCS with a rate letter setting the ARM rate of claimant's benefits at level 4I.

DATED: May _____, 2007

ROY W. HEWITT
Administrative Law Judge
Office of Administrative Hearings

Note: This is a final administrative decision pursuant to Welfare and Institutions Code section 4712.5(b)(2). Both parties are bound hereby. Either party may appeal this decision to a court of competent jurisdiction within 90 days.